

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4
5 UNITED STATES OF AMERICA

6
7 vs.

8
9 RYAN HARRIS

10
11 *****

12
13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15 Motions in Limine

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Friday, February 17, 2012

22 *****

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24 Official Court Reporter
25 United States District Court
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1 P R O C E E D I N G S

2 (Begins, 10:15 a.m.)

3 THE CLERK: Criminal Matter 09cr10243, the
4 United States of America versus Ryan Harris. The Court
5 is in session. You may be seated.

6 THE COURT: Good morning. Would counsel
7 please identify themselves for the Court and for the
8 record.

9 MR. BOOKBINDER: Good morning, your Honor.
10 Adam Bookbinder and Mona Sedky for the United States and
11 in the courtroom as well is FBI Special Agent Timothy
12 Russell. The IRS Special Agent, Special Agent Ryan, is
13 not here because he had a conflict today, but I
14 understand from Mr. McGinty that he has no objection to
15 Special Agent Ryan being in the courtroom as well.

16 THE COURT: Well, I inferred that from the
17 absence of briefing of the dispute, but we'll confirm
18 that momentarily.

19 Mr. McGinty.

20 MR. MCGINTY: And Charles McGinty and
21 Christine Demaso for Mr. Harris, who is on the line,
22 and, your Honor, there is no objection to the presence
23 of both agents during the course of trial.

24 I would note one other matter that the Court may
25 want to address, since Mr. Riley is here, um, there's

1 the issue of travel and lodging expenses for
2 Mr. Harris. The Court had entered an order, which was
3 filed on February 8th, to accommodate Mr. Harris with
4 both the travel and the lodging expenses. Mr. Harris,
5 um, has made those arrangements himself. Consequently
6 we're asking that the Court now vacate the order and
7 relieve Pretrial Services as well as the Marshal's
8 Office of any --

9 THE COURT: He's going to pay for his own
10 travel?

11 MR. MCGINTY: He's going to pay for his own
12 and assure his own presence.

13 (Pause.)

14 THE COURT: Will he be able to pay for
15 counsel? I'll deal with that, um, if and when we get to
16 sentencing.

17 All right. But let me -- Mr. Harris, are you on
18 the phone?

19 THE DEFENDANT: Yes, I am.

20 THE COURT: Do you understand that you have to
21 be here in court in Boston at 9:00 a.m. next Tuesday,
22 February 21?

23 THE DEFENDANT: Yes, I do.

24 THE COURT: And are you going to be here?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: And have you indeed, you know,
2 made the arrangements for your travel and lodging while
3 you're here in Boston for this trial which may take
4 several weeks?

5 THE DEFENDANT: Yes.

6 THE COURT: All right. Then I'll -- well, let
7 me ask Pretrial Services. Is there any --

8 Well, I want you to provide your itinerary today
9 to Pretrial Services and to Mr. McGinty. In other
10 words, I want to know what your flights are, where
11 you're staying.

12 Do you have a cell phone?

13 THE DEFENDANT: Yes.

14 THE COURT: What's the number?

15 THE DEFENDANT: Area code 858, 335-2456.

16 THE COURT: Where are you going to be staying
17 in the Boston area?

18 THE DEFENDANT: Um, the Red Roof Inn, Logan
19 Airport.

20 THE COURT: What's it called?

21 THE DEFENDANT: The Red Roof Inn at Logan
22 Airport.

23 THE COURT: Actually do you have your flight
24 information right there?

25 THE DEFENDANT: I believe so.

1 THE COURT: Um, why don't you provide it now
2 and then it will reduce the number of moving parts.

3 THE DEFENDANT: Um, Delta, flying out of
4 Portland to Boston and arriving at 3:41 p.m. on Monday
5 February 20th, 2012.

6 THE COURT: And what's the flight number?

7 THE DEFENDANT: Um, the confirmation code?

8 THE COURT: The flight number.

9 THE DEFENDANT: Okay. Let me see here.
10 (Pause.) The flight number is 8987.

11 THE COURT: All right. I will look forward to
12 seeing you at 9:00 on Tuesday morning. You're ordered
13 to be here then. And if for some reason you're not
14 here, I'm going to understand that you waived your
15 presence for jury selection. We'll start without you.
16 And if there's any change in your travel plans or where
17 you're going to be staying, um, it's essential that you
18 let Mr. McGinty and Pretrial Services know immediately.
19 Okay?

20 THE DEFENDANT: Okay.

21 THE COURT: All right. Thank you very much.

22 All right. Now, I apologize for coming in late,
23 but, among other things, I was trying to catch up with
24 the filings that were made yesterday.

25 The government has moved to dismiss Counts 8 and

1 9, which I believe are the wire fraud substantive counts
2 involving Lasky Genoh, um, and I need to understand this
3 a little better. I have limited discretion in this
4 area, but I have to make sure that the defendant is not
5 going to be prejudiced by the dismissal, among other
6 things. Could you speak briefly to the reasons for the
7 dismissal and particularly whether in effect it's a
8 dismissal with prejudice, so the defendant doesn't face
9 the risk of another independent prosecution for engaging
10 in a scheme or conspiring with Lasky Genoh.

11 MR. BOOKBINDER: Yes, your Honor, it is
12 dismissal of prejudice and here's what happened. Um,
13 essentially when we sat down with Mr. -- I think it's
14 pronounced "Genoh," um, to review with him his testimony
15 before trial, we learned that the facts were, that he
16 had described earlier, were true, but that there was an
17 added complexity which undermined the possibility of
18 basing charges against Mr. Harris on Mr. Genoh's actions
19 and that is this.

20 Mr. Genoh did, as the records indicate, as he
21 said, buy some equipment by TCNISO's website, from
22 Mr. Harris, and then shortly thereafter he did get free
23 unpaid internet service for more than a year, but there
24 was an intervening event that we didn't know about until
25 last week and that is that he gave the equipment that he

1 bought to a friend of his who then gave him back a modem
2 that was able to get him free internet service. That
3 modem that he was given back appears, based on his
4 memory, to be made not by and modified not with the
5 software made by Mr. Harris, but actually by another
6 company or competitor essentially of Mr. Harris's and
7 called Hacksaware. And so, um, once we learned that,
8 um, we concluded that we needed to dismiss those counts
9 and they are being dismissed with prejudice.

10 THE COURT: And does the defendant have any
11 questions or concerns?

12 MR. MCGINTY: No, your Honor.

13 THE COURT: Well, let me ask this question.
14 Are there any implications for the conspiracy count?
15 Previously, although there's no bill of particulars and
16 there's no named unindicted co-conspirators, I was told
17 that the government was, you know, intending to prove a
18 conspiracy with the four people in Massachusetts named
19 in the manner and means. Now I guess we're down to
20 three. Right?

21 MR. BOOKBINDER: That's correct.

22 THE COURT: All right. So it changes the
23 nature of the conspiracy count, and having just thought
24 about this quickly, it doesn't appear to me that it
25 changes -- that it would create some kind of variance --

1 um, the concerns that underline variance. In other
2 words, if you were trying to add a co-conspirator, there
3 would be a question of fair notice to the defendant,
4 that he had notice of four, that he prepared for four,
5 but now he only has to deal with the three alleged
6 co-conspirators.

7 Second, there's not a double jeopardy problem
8 because you've told me that the government will not
9 prosecute Mr. Harris based on some alleged scheme or
10 conspiracy with Genoh, right?

11 MR. BOOKBINDER: Correct.

12 THE COURT: Are you planning to offer any
13 evidence of the transactions with Genoh?

14 MR. BOOKBINDER: Um, no, your Honor, we will
15 not use him as a witness. He's not going to testify.

16 THE COURT: So there's no risk of prejudicial
17 spill-over. I haven't researched this and you haven't
18 addressed it.

19 But do you anticipate any variance issues,
20 Mr. McGinty, based on dismissing these two counts?

21 MR. MCGINTY: Well, my understanding is that
22 the government will not be trying to prove any conduct
23 that's attributable to Mr. Genoh, so I don't see a
24 concern there. Um, and with respect to variance, we
25 wouldn't be resting a variance claim on the single

1 participation of Mr. Genoh.

2 THE COURT: You would not?

3 MR. MCGINTY: Would not.

4 THE COURT: Would you be resting it in part on
5 him?

6 MR. MCGINTY: No, we're not. He would not be
7 part of that calculus.

8 THE COURT: Okay. Then I'm allowing the
9 motion to dismiss.

10 (Writes.)

11 THE COURT: So I've endorsed this as follows:
12 "As stated in court, the government intends this
13 dismissal to be with prejudice, therefore Counts 8 and 9
14 are hereby dismissed with prejudice."

15 MR. BOOKBINDER: Thank you, your Honor.

16 In light of that I guess it raises questions as to
17 what the Court, and I suppose defense counsel, would
18 like the government to do with the indictment. I
19 understand that you typically allow the indictment to go
20 back to the jury, is that correct?

21 THE COURT: Correct. I think in the
22 circumstances -- well, let's see, it should be
23 redacted.

24 MR. BOOKBINDER: Mr. Genoh appears, um, in two
25 places in the indictment, your Honor, one is in the

1 overt act section.

2 (Pause.)

3 THE COURT: What paragraph?

4 MR. BOOKBINDER: At 48 through 51. And then
5 again, and I apologize, your Honor, there's one other
6 place. He's mentioned as an unindicted co-conspirator
7 in Paragraph 6, and that's at the beginning of the
8 indictment as well.

9 THE COURT: Well, let's see.

10 (Pause.)

11 THE COURT: All right. And he is mentioned in
12 the subsequent counts?

13 MR. BOOKBINDER: And in the subsequent counts,
14 yes.

15 THE COURT: Is there an objection to having
16 the indictment redacted?

17 MR. MCGINTY: Um, for purposes of eliminating
18 the specific references to him, no.

19 THE COURT: So those paragraphs should be --

20 MR. MCGINTY: Those paragraphs and then the
21 paragraphs which would be in the substantive counts
22 would be Counts 8 and 9 on Page 12.

23 THE COURT: Okay.

24 MR. BOOKBINDER: And when we do the redaction,
25 your Honor, I assume we'll just renumber the counts?

1 THE COURT: Um, I think that's satisfactory.
2 Just do it, show it to Mr. McGinty, get me a copy,
3 because it will need to be read to the jury.

4 So you don't redact Paragraph 6. And what are the
5 other paragraphs?

6 MR. BOOKBINDER: 48 to 51. And then there's
7 just Counts 8 and 9 of Paragraph 60.

8 THE COURT: Okay. That's fine. Very good.

9 All right. Then with regard to -- I may revise
10 the sequestration order, but in any event, I'm ordering
11 and revising it that both agents can be in the courtroom
12 at all times in the future.

13 In my February 9 order, memorializing what I said
14 earlier on February 8th, I ordered the government to
15 show the defendant any chawks he proposes to use and the
16 defendant to register any objections.

17 Did you disclose the chawks because I received no
18 objection?

19 MR. BOOKBINDER: We have, your Honor, and we
20 just discussed that earlier with Mr. McGinty, who has
21 raised a concern about one word in one of our chawks.
22 We will discuss it. We may be able to reach an
23 agreement on that. If not, we'll obviously bring it to
24 the Court's attention.

25 THE COURT: Okay. I'll deal with that Tuesday

1 morning, if necessary. So you've reached agreement with
2 regard to the agents.

3 What about the status of the possible
4 stipulation?

5 MR. MCGINTY: Your Honor, if I might? We're
6 in the process of arguing those out now. I expect that
7 to be seamless.

8 THE COURT: Okay. And I believe I told you
9 last week that I'd like Mr. Harris to sign those
10 stipulations, too. So they can be signed by Tuesday and
11 submitted then.

12 Okay. Let me tell you about the jury selection
13 process.

14 We're going to get, I think, at least 68 potential
15 jurors. I will devise a set of questions that I'll go
16 over with you on Tuesday morning before they come in and
17 I'll talk to you a little bit about what you've
18 submitted now and they'll be seated 1 to 68 in the
19 courtroom. And assuming, say, there are 18 questions,
20 I'll ask all 18 questions and I'll ask them to stand if
21 the answer to them is "yes."

22 Then we're going to go back into the jury room.
23 It's public, the Court Security Officers will be
24 instructed to tell any members of the public they can
25 come back there and watch it, if they want, and I'm

1 going to question all of them, starting with Juror
2 Number 1, individually regardless of whether they
3 answered something "yes" or "no." I sometimes find that
4 people who didn't answer anything "yes" don't understand
5 English or can't hear and I also, even more often, find
6 that people say there's something they should have
7 answered "yes" to when they don't have to stand up and
8 disclose that to everybody else. So we'll do that. And
9 my goal will be to seat 12 jurors and at least 2 and
10 maybe more than 2 alternates. But at least 2
11 alternates.

12 So if there are 2 alternates, it will be necessary
13 to qualify 32 potential jurors. The defendant will have
14 10 objections, the government will have 6. Um -- let's
15 see. That's 16 objections to get 12 jurors, and that's
16 28, and then I would have 4 potential alternates with
17 each side getting one objection.

18 But basically I would aim to qualify 32 people and
19 when that's done, um, I'll give you a chance to think
20 about them and then at the sidebar I'll have you
21 exercise your challenges, the defendant two, the
22 government one, until you have an equal number left and
23 then the government will go first.

24 I'll repeat this on Tuesday for you. But do you
25 have any questions about that so far?

1 MR. MCGINTY: Um, just a few.

2 When the jurors come in, there's 68 of them, they
3 will be in the order of the juror lists that have been
4 provided, so they won't be again randomized in that
5 order?

6 THE COURT: No, they won't. Number 1 will be
7 to my far left, they'll go right across and we'll have
8 them right in order, and they'll come in in that order.

9 MR. MCGINTY: When the Court asks the
10 questions, if the jurors raise their hand, they won't
11 respond then, they will all -- only at the end they'll
12 be brought in singularly to address that?

13 THE COURT: Exactly. When they come back,
14 I'll say, "Why did you answer 'yes' to this question?
15 Is there any other question that on reflection you feel
16 you should have answered 'yes' to?"

17 MR. MCGINTY: And the specific inquiries the
18 Court, whether you -- the general range of questions the
19 Court's going to put to the jurors when they're
20 questioned in the back, um, we're going to get notice of
21 that today or on Tuesday?

22 THE COURT: You'll get it on Tuesday, but
23 they'll basically be amplifications of the questions
24 that I ask in open court. In other words, you know,
25 unless something comes up that wasn't elicited, which

1 shouldn't happen, but might, um, I'll be covering the
2 same subject matter. And you'll get a chance to signal
3 me if you think of other questions or if you have an
4 objection, and I'll excuse the juror so you don't have
5 to express yourself in front of the juror.

6 It's a careful process. It takes some time. But
7 it's the very rare trial where somebody doesn't tell me,
8 back in the jury room, "Oh, yes, I have a conviction or
9 my son has a conviction, you know, for drugs, but I was
10 too embarrassed to stand up in front of everybody else."

11 And I just glanced at your questions, so I'll look
12 at them more closely.

13 I see that the defendant has some objections to
14 what are usually pretty standard questions about, you
15 know, whether a potential juror or somebody close to him
16 or her has ever been a victim of a crime, for example,
17 or involved in a criminal case, I would usually ask as a
18 victim as a witness or as a defendant? But I think
19 that's relevant to possible prejudice against the
20 government, among other things, so I expect I'll cover
21 that.

22 And I expect I will ask whether anybody has
23 obtained television or internet service without paying
24 for it. If somebody is engaged in the kind of conduct
25 that's at issue in the case, um, that may certainly be

1 relevant and they may be disqualified.

2 MR. MCGINTY: Um, my difficulty with that,
3 your Honor, is that it's sort of a broad range of
4 persons who get internet service who may question
5 whether it's appropriate to do that. If someone, on one
6 occasion, pulls into a parking lot behind a pizza store
7 and gets the benefit of their WIFI, is that person going
8 to be up there confessing to misconduct? So there's
9 sort of this broad range of possible misunderstanding in
10 which we will end up spending a good deal of time and
11 frankly may embarrass people needlessly. So I think
12 that if it's narrowly framed, it's one thing, but where
13 it can be capturing --

14 THE COURT: Well, I'll work on the questions,
15 but the fact that somebody answers "yes" doesn't
16 necessarily mean that he or she will be disqualified,
17 it's just something to discuss. If they say, you know,
18 "Occasionally I can get on my neighbor's wireless
19 because it doesn't need a code and I've done that once
20 or twice," you know, that's one thing. If somebody
21 says, "I bought similar products and have done this or
22 my son has done it," then that may be disqualifying.

23 MR. MCGINTY: Well, I certainly understand
24 that, but I'd rather not, in the first instance, have a
25 person who did as you describe thinking that, "Well, is

1 there something amiss about that, because I don't know
2 what the nature of the charge here is about, the misuse
3 of the internet?" and then coming up to embarrass
4 themselves needlessly. So if it's a focused inquiry
5 about the nature of the conduct as you'll hear and it's
6 captured --

7 THE COURT: No, actually it's probably going
8 to be pretty broad to begin with and it will get focused
9 in the individual questioning where the potential
10 embarrassment will be minimized because only the
11 lawyers and the parties will be privy to it, but it's
12 very important. Okay? But I'll think about it further.

13 Then yesterday the defendant filed two additional
14 motions in limine and to the extent they relied on some
15 recently-disclosed evidence, they're not untimely, but I
16 want to get a sense of them and whether they're going to
17 be disputed before I get to the matters that the parties
18 have both addressed.

19 One of them is the defendant's motion in limine
20 regarding the Russian web host. I looked at this
21 quickly and the defendant reminds me that -- I think --
22 well, let me ask you this.

23 Has the government read this motion?

24 MR. BOOKBINDER: Yes, your Honor.

25 THE COURT: And is this evidence you want to

1 present?

2 MR. BOOKBINDER: Your Honor, what we had
3 intended to elicit was simply testimony that, for a
4 period of time, the website was listed at a hosting
5 facility in Russia and that it was then moved back --
6 that Mr. Harris then moved it back to Go Daddy in the
7 United States, which occurred in 2005 and 2006, um, and
8 that much we did intend to elicit. That's the story of
9 the business that's the subject of the case.

10 THE COURT: And did I exclude some evidence on
11 one of the chats about Russia last week?

12 MR. BOOKBINDER: You did. You did exclude a
13 chat where there's a discussion about the fact that in
14 Russia, that something like a court order wouldn't be --
15 that a court order isn't enforceable in Russia or
16 something like that. You did exclude that, that's
17 correct, your Honor.

18 THE COURT: All right. I'm glancing at this
19 motion in limine. I see that the defendant has
20 recognized why I mentioned consciousness of guilt
21 previously. I actually thought it was the defendant who
22 might want me to be using that framework to strike the
23 balance because the case you cite, **Tracey**, is
24 essentially the proper principle, as I understand it,
25 and that if there's something that is arguably evidence

1 of guilt, that the government, in this case, has to make
2 a sufficient showing there is guilt concerning the crime
3 charged and not something else.

4 Do you want to speak briefly to this, Mr. McGinty,
5 so I could think about it?

6 MR. MCGINTY: Well, frankly the suggestion of
7 a consciousness of guilt instruction elevates the
8 significance of this. The government wants this to be
9 out there knowing full well that the suggestion, um,
10 that a server was located in Russia, um, will have an
11 effect on how the jurors perceive Mr. Harris, that he
12 couldn't use a domestic one, so he had to use one
13 abroad. They want that to be a meaningful reflection of
14 what his intent was. Well, it's hardly probative if it
15 turns out that Mr. Harris, had he had that consciousness
16 of guilt and had he had that guilty knowledge, would not
17 have gone to the Go Daddy web server which he used in
18 2008 and 2007.

19 THE COURT: What was the period of time that
20 the Russian server was used?

21 MR. MCGINTY: Well, the government's claim, as
22 I understand it, is at some period prior to the use of
23 the Go Daddy server there had been a Russian server and
24 they want that to reflect, um, as they had with respect
25 to the chat, to reflect on his intent and his knowledge

1 that what he was doing was somehow unlawful. You know,
2 it sort of begs the question, unlawful in what respect,
3 are we talking about copyright concerns or are we
4 talking about criminal concerns? We have the ambiguity
5 about what the nature of the concern was that implicates
6 the **Tracey** question, which is, guilty about what? But
7 then you have what seems to be the fact that makes this
8 all prejudicial and not probative which is that, um,
9 within the time that the government is alleging that
10 these persons got products from Mr. Harris, um, his web
11 server was located, I believe, in Arizona.

12 So it's not a probative fact and it surely will
13 have the kind of prejudicial effect that I think drove
14 the Court to say that the chat, um, would not be
15 admissible.

16 THE COURT: What's the probative value from
17 the government's perspective?

18 MR. BOOKBINDER: Your Honor, there's no
19 question that, um, Mr. Harris moved back to the United
20 States, but the fact that he hosted his website in
21 Russia is probative, I'd suggest, to consciousness of
22 guilt. There's no other reason why you would host a
23 website abroad, particularly in a place like Russia,
24 unless you were trying to avoid the legal process,
25 detection, um, things of that nature. In fact, the

1 reason why he brought his service back here, I think the
2 evidence suggests, is it just wasn't working in Russia.
3 There were too many problems. There are chats where
4 this company, the Russian company, you know, the service
5 has gone down for some period of time. He can't
6 understand why. He comes back because frankly the
7 service is better and more efficient and more reliable
8 in the United States. But the fact that it was there in
9 the first place I think is relevant.

10 THE COURT: What years do you say it was
11 there?

12 MR. BOOKBINDER: It was there until at least
13 2005 and we're not sure, your Honor, I don't know that
14 we have the specificity on when it was brought back.
15 But there's no question it was there in 2005 at the time
16 of the chats. So it was either 2006 or 2007 when it
17 came back to Go Daddy.

18 THE COURT: Well, I'll have to give this some
19 further -- or some more thought, but -- well, there are
20 other cases that I'm going to take a look at on
21 consciousness of guilt. And the government should file
22 a brief response to this. You can look at **Boyle**, 675
23 F.2d 430 at 432 to 433 and **Myers**, 550 F.2d 1036 at 1049
24 to 1050. (Pause.) Because I would have to instruct the
25 jury something like the following. I mean, you want

1 this essentially as consciousness of guilt evidence.

2 So I would instruct something along the lines of:
3 "The jury would have to decide whether the evidence is
4 consciousness of guilt concerning any or all of the
5 crimes charged in this case," if they find that Russia
6 was used. I'd have to tell them that: "Feelings of
7 guilt may exist in innocent people and certain acts do
8 not necessarily reflect actual guilt of particular
9 crimes. In your consideration of the evidence of
10 alleged consciousness of guilt, you should consider that
11 there may be reasons for a person's actions including
12 consistent with innocence of the crimes charged in this
13 case. It is up to you to decide if there's proof that
14 something was done and whether if so that shows
15 consciousness of guilt concerning the crime charged
16 here. If these facts are proven, you must decide what
17 weight or significance to give them.

18 That's essentially the instruction on
19 consciousness of guilt that I gave in **DiMasi**. You know,
20 it may be that -- it's very valuable to raise these
21 before trial, but it may be that I'll exclude some of
22 this initially, but after listening to the questioning
23 and hearing some of the other evidence, I'll see if the
24 door's opened, but to be able to do the 403 balancing.

25 MR. MCGINTY: Well, your Honor, the concern

1 here is that if the government proposes to introduce
2 this, then I need to respond, and we get into the
3 question of whether a Russian server is less expensive
4 than a U.S. server? Um, we get into a whole list of
5 questions that divert the case from where it ought to be
6 going. And if this is in pursuit of a balance, the
7 government suggests that Mr. Harris is looking at this,
8 um, as an issue of efficiency, in other words, that the
9 Russian server proved to be inefficient. Were he
10 concerned about whether he would be prosecutable for
11 what he's running through that server, um, my guess is
12 that that would outweigh any concern about efficiency.
13 My guess is that internationally there's a lot of other
14 places you can host a server and not be concerned about
15 whether you're going to get prosecuted. The fact that
16 he comes here and does it in Arizona I think speaks
17 mightily to whether there's an inference here or not.

18 THE COURT: Are you going to make any argument
19 based on the fact that the server was in Arizona?

20 MR. MCGINTY: No. None. None.

21 THE COURT: Okay. Well, does the government
22 want to respond?

23 Well, let me put this way. The government
24 shouldn't offer this evidence until you respond and I
25 rule on it. So --

1 MR. BOOKBINDER: Your Honor, we'll give it
2 some thought as to whether -- we'll either respond and
3 explain our bases and provide some legal support or if
4 we decide if on balance it's not necessary, then
5 we'll -- then we understand the Court to be saying that
6 we can't offer it unless we persuade you that we can.

7 THE COURT: Yes, let's leave that on there for
8 now, um, and something might open the door to it and, of
9 course, it would be during trial. But I would say, you
10 know, if you decide you want it, you should need to file
11 something by 1:00 on Monday, if you want it for your
12 opening. Okay? Otherwise, at the moment, it's
13 excluded.

14 Then the other one, which is the defendant wants,
15 in his renewed motion in limine, Docket 125, to exclude
16 evidence of his own allegedly unlawful conduct, the
17 testimony the government intends to elicit alleging that
18 Harris used TCNISO products to get further enhanced
19 internet service himself. It's not clear to me -- I
20 need to be reminded of the years of that evidence and
21 whether it's within the period of the conspiracy.

22 (Pause.)

23 MR. BOOKBINDER: Your Honor, there is a, um --
24 and some of this we discussed, as you may remember, in
25 the context of the chats. But we believe it to be sort

1 of at least during the period of 2005 to 2007. That's
2 when, um -- the chats are in 2005 that we're talking
3 about.

4 THE COURT: And the alleged period of the
5 conspiracy is --

6 MR. BOOKBINDER: 2003 to 2009, I believe.

7 THE COURT: So basically the government would,
8 I assume, argue that this is not 404(b) evidence, this
9 is intrinsic, this is evidence of Mr. Harris's, um --
10 well, it's evidence of the existence of the conspiracy,
11 his membership in it, overt acts in furtherance of the
12 conspiracy?

13 MR. BOOKBINDER: Your Honor, as we set out in
14 -- we haven't obviously filed something in response to
15 his latest motion, but we've addressed this earlier in
16 our briefing and what we said is that -- is absolutely
17 that, the fact that it is true, Mr. McGinty is right,
18 that there is no count charging Mr. Harris with using
19 the products because there wouldn't be venue here for
20 that. However, um, what we've charged is that he was
21 part of a conspiracy to help the named co-conspirators
22 and others use these products to steal services.

23 THE COURT: And remind me what you expect the
24 evidence of Mr. Harris's own misuse to be?

25 MR. BOOKBINDER: Um, that Craig Philips is the

1 vice-president of his company with him, his friend and
2 also roommate, will testify they both before they
3 discussed this before they were living together, the
4 fact that they were both using the products and, um --
5 and then Mr. Philips will say that, um, they -- that
6 when they were living together they had one of these
7 modems set up and they both used it. There are also
8 Harris's own statements in the chats that we talked
9 about that support this as well.

10 So there doesn't seem to be any ambiguity about
11 the evidence and the fact frankly that he was not just
12 the designer and the seller of these products, but also
13 one of the users himself is extrinsic to the conspiracy.

14 THE COURT: Intrinsic.

15 MR. BOOKBINDER: I'm sorry. It's intrinsic to
16 the conspiracy. And it's also the best possible
17 evidence of his own knowledge. There's no better.

18 MR. MCGINTY: And they did suggest that it was
19 offered in terms of his knowledge. Um, what they have
20 in their instructions, though, which says that among the
21 factors -- this is the new proposed Instruction Number
22 2.

23 THE COURT: Hold on a second. Let me see if I
24 can get it.

25 (Pause.)

1 THE COURT: All right. This is in the
2 government's revised proposed jury instructions, Number
3 115?

4 MR. MCGINTY: Correct.

5 THE COURT: What page?

6 MR. MCGINTY: At Page 8.

7 THE COURT: All right. Go ahead.

8 MR. MCGINTY: This is part of the instruction
9 for conspiracy involving a supplier of products or
10 services. Among the factors the government claims bears
11 on whether there was a conspiracy -- not knowledge of a
12 conspiracy, but a conspiratorial agreement, is a number
13 of considerations pointedly including the following,
14 quote, "It includes whether he personally engaged in
15 law-breaking himself," unquote. And so the government
16 is here using this not solely for purposes of showing
17 knowledge, they're offering it also to show intent to
18 participate in a conspiracy with others, um, elevating
19 what the initial offer was of this information and now
20 elevating it to a further use.

21 They also want to use it, now that the cat is out
22 of the bag, so to speak, on consciousness of guilt to
23 suggest that -- or not to suggest, but to make available
24 to the jury something that they will pointedly and
25 clearly and predictably use as evidence of consciousness

1 of guilt.

2 So this is not probative, in any significant way,
3 of knowledge. There's no question that --

4 THE COURT: Why isn't it probative of
5 knowledge that the devices can be used to steal internet
6 service if he's using it to steal internet service
7 himself?

8 MR. MCGINTY: Because it's redundant of other
9 proof.

10 THE COURT: But it's not that it isn't
11 probative.

12 MR. MCGINTY: Right, but it's redundant of
13 other proof.

14 THE COURT: By the book, right?

15 MR. MCGINTY: Proof from the book, proof from
16 other places, there's other testimony that --

17 THE COURT: Well, the book says "Don't use
18 this to steal services." It's bears on the credibility
19 of that contention.

20 MR. MCGINTY: Well, your Honor, there are a
21 number of instances where the government has
22 acknowledged that they have abundant different ways to
23 prove Harris's knowledge. So the issue here is, um, is
24 this redundant of other proof? Yes. On a 403 balance,
25 um, is this prejudicial? Um, highly, in that his law

1 breaking becomes a contributor to consciousness of
2 guilt, to the factfinding the government lays out for
3 the Court as part of a determination of whether a
4 conspiracy existed, and quite apart from what it was
5 originally proffered as, which is going to the question
6 of his knowledge.

7 So this is plainly, um, the kind of proof that's
8 going to impact on a jury in a way that will have a
9 disproportionate effect balanced off of a minimum
10 probative effect.

11 THE COURT: Yeah, but I don't see why --
12 everything the government introduces is intended to be
13 prejudicial to the defendant to prove that he's guilty,
14 the question is whether it's unfairly prejudicial, and
15 at the moment it doesn't appear to be to me, but I'll
16 look at it more. And I'll also look at the jury
17 instructions more. I'm actually not going to have
18 further discussion today about the jury instructions,
19 except as it comes up in this context, because I have to
20 do more work on it.

21 So this is helpful. But at the moment, um,
22 references to Russia are out, but I'm not excluding
23 this.

24 MR. MCGINTY: Well, I would only ask the Court
25 to look at that language that they put in their brief

1 and not only is that -- or in their instruction. I
2 mean, not only is that, um, a suggested instruction from
3 the Court, but it dictates the flavor of how the
4 government is going to try the case and if it is on the
5 back of Harris as a law breaker, which is how this is
6 framed, then this case is going in a direction that the
7 Court ought to steer it away from.

8 THE COURT: How is this different than the
9 argument that would be made in a drug conspiracy that
10 somebody's charged with conspiring to possess with
11 intent to distribute and distribute drugs and evidence
12 that the defendant himself was one of the people who
13 distributed drugs as part of the alleged conspiracy
14 would come in I think both to prove the existence of the
15 conspiracy and the defendant's membership in it and
16 overt acts in furtherance of the conspiracy. Why isn't
17 this analogous?

18 MR. MCGINTY: Frankly, in a lot of cases the
19 defense wants to introduce that to show that his
20 presence there is explained by something different from
21 his participation in the conspiracy, namely he is there
22 to get drugs.

23 THE COURT: No, I'm talking about his
24 distribution of drugs.

25 MR. MCGINTY: I understand that. But he can

1 -- that can be introduced and the government can try to
2 keep that out actually in cases because they're
3 concerned that that's going to be the defense.

4 THE COURT: Keep out that he distributed
5 drugs?

6 MR. MCGINTY: No, keep out that he was himself
7 a possessor and user of drugs. So that can have a very
8 different use and a positive use that a defense would,
9 frankly in drug cases, and I've done this in cases, to
10 introduce that in to vitiate the claim that he was part
11 of the conspiracy.

12 Here what the government wants is to use this as a
13 reflection of his character, his character as a law
14 breaker and his character in a way that paints him in a
15 way that makes the jury much more inclined to --

16 THE COURT: But again this is -- assuming that
17 it's within the period of the conspiracy that's alleged,
18 which I understand it to be, it would be intrinsic, it's
19 not evidence of other bad acts as part of the alleged
20 conspiracy. But I'll think about this further.

21 (Pause.)

22 THE COURT: All right. But, you know, what I
23 instruct the jury initially, which may not be much, and
24 eventually, which I'll develop carefully on these **Direct**
25 **Sales**-related points, is important, but I need to do a

1 lot more work before I talk to you about it.

2 That reminds me of something else that I intended
3 to ask you about.

4 (Pause.)

5 THE COURT: All right. Pursuant to my order,
6 the government gave its witness and exhibit order list,
7 and I asked you to identify -- and then I asked the
8 defendant to tell me what he was objecting to with
9 regard to the initial witnesses.

10 So, just to be clear, and I have to prepare on
11 this, on Document 118, the government's witness and
12 exhibit order, these are the witnesses.

13 About how many days do you think these witnesses
14 will take?

15 MR. BOOKBINDER: Your Honor, we'll definitely
16 finish before the end of the second week.

17 THE COURT: Are these all of your witnesses?

18 MR. BOOKBINDER: That's it.

19 THE COURT: Okay. That's what I was trying to
20 sort out. That's a better question. Because you -- and
21 I don't object to this. I commend it. You've done more
22 than I ordered you to do. I said to give me the
23 witnesses for the first couple of days.

24 MR. BOOKBINDER: Right.

25 THE COURT: But just in terms of my own time,

1 you know, we'll be trying the case in the mornings and I
2 think I've got other matters, I think, every afternoon
3 next week, but what --

4 The first witness is Phillips?

5 MR. BOOKBINDER: The first witness will be
6 Craig Phillips, who is probably also the longest
7 witness, um, and I would say his direct would be between
8 an hour and a half and two hours probably.

9 THE COURT: All right. And these are the
10 exhibits you want to offer in your case in chief. And
11 then the defendant has certain objections. And before
12 Phillips testifies, I will discuss with you the
13 foreseeable objections to the Phillips exhibits. They
14 seem to go from about 1 to 29, um, but not all 29
15 exhibits. Um, and I'll either rule on them or give you
16 some guidance. So if we don't get to that Tuesday, then
17 we'll spend some time on it Wednesday morning.

18 All right. Is it fair to assume that Phillips
19 will probably take at least the first day -- the first
20 day of testimony?

21 MR. MCGINTY: I think -- I have to just back
22 up and ask something.

23 Tuesday is jury selection and openings are
24 Wednesday?

25 THE COURT: Correct.

1 MR. MCGINTY: So I would guess that, um --

2 THE COURT: So we won't get past Phillips on
3 Wednesday.

4 MR. MCGINTY: We may, conceivably.

5 THE COURT: We may? Okay.

6 So then the next witness is Kohler and there are
7 no exhibits, so there are no objections.

8 (Pause.)

9 THE COURT: Who is Kohler?

10 MR. BOOKBINDER: Chris Kohler is an employee
11 of Motorola who will be offering some -- well, some of
12 his testimony is expert testimony talking about what a
13 cable modem is and how it works and how cable internet
14 access works, essentially educating the jury, and then
15 talking a little bit about the TCNISO.

16 THE COURT: Okay. And the defendant hasn't
17 designated an expert or filed the expert reports that I
18 ordered.

19 So is it correct to assume that the defendant does
20 not intend to present an expert in his case in chief?

21 MR. MCGINTY: That's correct.

22 THE COURT: All right.

23 And then Lindquist, she's the alleged designer,
24 right?

25 MR. BOOKBINDER: Yes.

1 THE COURT: And I'll have to look at the
2 objections to the -- to Exhibit 6.

3 (Pause.)

4 THE COURT: And Brodfuehrer is?

5 MR. BOOKBINDER: He works for Charter
6 Communications, one of the cable company ISPs, and he
7 again will provide some sort of educational testimony to
8 the jury about how internet access works and again some
9 specific -- he's the one who tested, and we have short
10 video clip demos, of the defendant's products.

11 THE COURT: Okay. And Larosa?

12 MR. BOOKBINDER: Um, Larosa is one of the
13 Massachusetts customers.

14 THE COURT: Okay.

15 Madeira?

16 MR. BOOKBINDER: Is another Massachusetts
17 customer.

18 THE COURT: Hanshaw?

19 MR. BOOKBINDER: Hanshaw is, as you know, a
20 Massachusetts user and cooperator.

21 THE COURT: I'm sorry. A cooperator?

22 MR. BOOKBINDER: And a cooperator. He was
23 charged in a separate case.

24 THE COURT: Oh, so he's a co-conspirator.

25 MR. BOOKBINDER: Yes, he's a co-conspirator.

1 They're all -- the Massachusetts customers, all three of
2 them, I guess, are co-conspirators.

3 THE COURT: Is he cooperating with the
4 government?

5 MR. BOOKBINDER: Mr. Hanshaw? Yes.

6 THE COURT: Oh, he is.

7 MR. BOOKBINDER: So he has pled guilty. He
8 had a plea agreement. He's already served his juvenile
9 prosecution, he's served his sentence, so it's not the
10 typical cooperation posture, but he is testifying
11 pursuant to a plea agreement.

12 THE COURT: And does the plea agreement, by
13 letter, provide immunity?

14 MR. BOOKBINDER: It does.

15 THE COURT: All right. So you're not going to
16 have a need of a 6001 order for him?

17 MR. BOOKBINDER: Correct, your Honor.

18 Yes, as to -- and actually while we're talking
19 about immunity actually, if I could for a minute, um, I
20 do want to address this because it applies to three of
21 our witnesses. We have provided and given the defendant
22 notice of the fact that the other -- um, Mr. Madeira and
23 Mr. Larosa, for both of them, um, our office has given
24 them letter immunity, um, and they're not represented by
25 counsel, they didn't request it, but to make things

1 proceed smoother and to try to make sure their testimony
2 is as accurate as possible, we've given them letter
3 immunity and they will be testifying pursuant to that.

4 THE COURT: All right.

5 (Pause.)

6 MR. BOOKBINDER: One other matter.

7 Ms. Lindquist, um, has requested -- she is
8 represented by counsel who has requested on her behalf
9 that we apply for, and we have filed this with the
10 Court, um, an application for court-ordered immunity.

11 THE COURT: When did you ask for that?

12 MR. BOOKBINDER: Um, several weeks ago, I
13 believe, we filed that, your Honor.

14 THE COURT: I haven't seen it, but we'll get
15 it, and I have no discretion, so.

16 MR. BOOKBINDER: Typically we --

17 THE COURT: If the order is in proper form.

18 MR. BOOKBINDER: Right.

19 Typically we file that ex parte. We've actually
20 given a copy to Mr. McGinty. We actually filed it
21 probably through ECF because there's nothing to be
22 sealed about it.

23 THE COURT: There's a lot of paper here and
24 somehow it hasn't come to my attention.

25 MR. BOOKBINDER: Yes. So I have the original

1 in front of me. I don't have the docket number. I
2 apologize for that. But what I wanted to raise is I
3 don't know whether the Court would want to inquire of
4 her in advance of her testimony and --

5 THE COURT: Yeah, I, sometimes -- well, often.

6 MR. BOOKBINDER: I apologize, your Honor. I
7 think it was filed February 5th.

8 THE COURT: -- conduct a voir dire, um, and
9 that would just be very brief. And it appears to me
10 that she would have the proper basis to assert a Fifth
11 Amendment privilege, so.

12 MR. BOOKBINDER: And, your Honor, Mr. Hohler
13 is indicating that he doesn't see it. I will check and
14 confirm that we filed it. And if not, I have the
15 original frankly right here. So I don't know if it
16 would be easiest for me just to hand it right up?

17 THE COURT: Okay. But there should be more
18 than one copy. But why don't you just -- well, actually
19 let me see it because sometimes your office doesn't
20 draft the orders in a way that I'll sign them.

21 (Passes up to judge.)

22 THE COURT: Okay. This is -- we'll give it
23 back to you. It should be filed again if it doesn't
24 show up on the docket.

25 MR. BOOKBINDER: That's fine, your Honor.

1 THE COURT: And I may just question her and
2 her lawyer very briefly before entering the order, like
3 before she testifies.

4 MR. BOOKBINDER: That's fine.

5 THE COURT: All right. We're going to have
6 the Go Daddy recordkeeper who will testify to what?

7 MR. BOOKBINDER: Um, your Honor, merely just
8 to authenticate the Go Daddy business record. The
9 records obtained from Go Daddy are related to TCNISO.

10 THE COURT: All right. And you're not going
11 to have a stipulation that will obviate the need for the
12 recordkeeper?

13 MR. MCGINTY: Your Honor, we've entered
14 stipulations on a number of things, but I don't
15 anticipate we're going to be able to reach a stipulation
16 here.

17 THE COURT: Well, is there going to be an
18 objection -- well, let me see. It says there's no --
19 Oh, I see. Exhibit 4 -- what's Exhibit 4?

20 MR. BOOKBINDER: Your Honor, Exhibit 4 are
21 records from -- it's an excerpt essentially of the
22 TCNISO records kept at Go Daddy for the customers who
23 are going to be testifying in this trial.

24 THE COURT: And on what basis do you say
25 they're admissible, as business records?

1 MR. BOOKBINDER: As business records, your
2 Honor.

3 THE COURT: All right. I mean, we'll take
4 this up as it comes. Is there something particular in
5 the records that you think makes them excludable as
6 business records?

7 MR. MCGINTY: Well, actually, your Honor, I
8 prefer at this time not to voice that concern.

9 THE COURT: Well, you're going to have to
10 voice it before the recordkeeper testifies.

11 MR. MCGINTY: I appreciate that, your Honor.

12 THE COURT: All right.

13 And Timothy Russell is who?

14 MR. BOOKBINDER: An FBI Special Agent, your
15 Honor.

16 THE COURT: Yeah. All right.

17 And Jason Ryan?

18 MR. BOOKBINDER: The IRS Special Agent.

19 THE COURT: Okay. That's useful.

20 (Pause.)

21 THE COURT: All right.

22 I want to now go back to where we left off in my
23 ruling on the entries in the chats in the posts, the
24 government's memorandum in support of its motions in
25 limine, Docket Number 94.

1 Here's where I am right now. And essentially for
2 reasons I'll give you an overview of, I'll hear you
3 further, we'll look at the particular statements, but,
4 um, my present intention is to admit the portions of the
5 chat logs relating to Mr. T and MooreR -- and you
6 should -- I'm going to direct, by Tuesday, you give the
7 stenographer a dictionary of all these unusual terms,
8 like how do you spell "MooreR" or the technical terms
9 that are involved, so the transcript, including the
10 draft transcript can be as accurate as possible. But I
11 intend to admit those conditionally as co-conspirator
12 hearsay based on the evidence that's been proffered to
13 me, which I'll note I think is -- if the government's
14 proof is as it predicts, um, there's a good chance I'll
15 be persuaded by a preponderance of the evidence that
16 Mr. T and MooreR were each members of the conspiracy at
17 the time they made the statements in question and that
18 those statements were in furtherance of the conspiracy.

19 MR. MCGINTY: Can I?

20 THE COURT: I'm going to explain this. This
21 is just a little something -- we're not finished. I'm
22 just telling you where I am and I'm going to tell you
23 why I'm there and then you're going to get a chance to
24 address it further.

25 The posts I find more problematic. The posts, to

1 the extent that the government is trying to get them
2 admitted under 801(d)(2)(E), seem to fall into two
3 categories, as I'll explain, that there's some evidence
4 that some of the people making the posts were customers,
5 bought something, but there's no evidence that anybody
6 else -- for some of the others there's no evidence, as I
7 understand it, that they were customers. So I have
8 questions as to whether the government's going to be
9 able to prove by a preponderance of the evidence to me,
10 admissible and inadmissible evidence, that they were
11 co-conspirators at the time they made the posts. I
12 doubt that they're verbal acts. I question their
13 relevance for other purposes. I have to give a limiting
14 instruction and do a 403 balancing.

15 So at the moment I'm not inclined to let the
16 government refer to the posts in the opening and wait to
17 hear until I, you know, have a fuller feel for the
18 evidence that somehow, you know, it would demonstrate,
19 for example, that Mr. Harris read the posts. But
20 basically let me tell you what leads me, for the moment
21 at least, to these conclusions.

22 To admit a statement under Rule 801(d)(2)(E), the
23 government recognizes it needs extrinsic evidence in
24 addition to the statement to ultimately prove by a
25 preponderance of the evidence that a conspiracy existed

1 and that the defendant was a member of the conspiracy
2 when the statement was made, and the Court is not bound
3 by the rules of evidence in making that determination
4 except with regard to privilege. That's Rule 104(a) and
5 (b). The First Circuit discussed this concept in
6 **Paradis-Rodriguez**, 160 F.3d 49, 56 to 57, citing
7 **Borgelay**, in which the Supreme Court held: "Trial
8 courts may consider any nonprivileged evidence
9 regardless of its admissibility in making Rule
10 801(d)(2)(E) determinations, including hearsay
11 evidence." Although there are various First Circuit
12 cases, among others, where the Court notes that there
13 was admissible evidence in addition to the statement
14 itself.

15 A statement by somebody who uses a pseudonym or
16 even somebody who's utterly anonymous may be admitted
17 under Rule 801(d)(2)(E) if the requirements are met.
18 And although the parties may not have cited it, I don't
19 know if the defendant found it, one of those cases is a
20 First Circuit case, **Alosa**, A-L-O-S-A, 14 F.3d 693 at
21 697. And there are cases in other circuits that have
22 concluded that anonymous co-conspirator statements are
23 admissible provided that the requirements of Rule
24 801(d)(2)(E) are satisfied. They include **Martinez**, 430
25 F.3d 317 at 325 to 328, a Sixth Circuit case. **Gill**, 58

1 F.3d 1414 at 1420, a Ninth Circuit case. **Dynalectric**
2 **Company**, 859 F.2d 1559 at 1581 to 1582. And **Almesnian**,
3 664 F.3d 467 at 405. I'm sorry, at 505 to 507.

4 More specifically, statements by individuals using
5 pseudonyms are admissible if the requirements of Rule
6 801(d)(2)(E) are met. Another relevant case on this
7 issue is **Gill**, 58 F.3d, the jump-cite is 1420.

8 The extrinsic evidence required to support the
9 admission of alleged co-conspirator hearsay can be
10 circumstantial evidence including the context and
11 content of the anonymous statement itself. That is the
12 ruling of **Martinez**, 430 F.3d at 324 to 328, a Sixth
13 Circuit case, upholding the admission of an anonymous
14 letter warning of a government investigation of the
15 conspiracy. And **Dynalectric**, 859 F.2d at 1581 to 1582,
16 which involved an anonymous phone call.

17 Statements can also be admitted for nonhearsay
18 purposes. A statement could be "the reciprocal portion
19 of an integrated utterance that puts the defendant's
20 statements into perspective and makes them intelligible
21 to the jury." That's **Colon-Diaz**, 521 F.3d at 38.
22 **Delacruz-Paulino**, 61 F.3d 986 at 996, Note 8, is to a
23 similar effect. In addition, questions are not hearsay
24 or they're not offered for the truth, as the First
25 Circuit said in **Vastig**, 42 F.2d 1319 at 1330.

1 As I said, it's my present intention to
2 conditionally admit some of the statements in the chat
3 logs of Mr. T and MooreR. The government's proffer
4 makes it reasonable to expect that the government will
5 prove a conspiracy existed and each of those individuals
6 remembers at the time that the statement is at issue and
7 it also appears the statements were in furtherance of
8 the conspiracy.

9 For example, some of the evidence relevant -- some
10 of the evidence that the government relies on with
11 regard to Mr. T, it doesn't intend to submit to the
12 jury, as I understand it. But I can consider that. And
13 some of it will be admitted to the jury foreseeably.
14 The evidence, the extrinsic evidence concerning Mr. T,
15 at this point, appears to include a March 31, 2005 chat
16 log already admitted for context that shows the
17 defendant gave Mr. T access to the member forum on the
18 defendant's website, which indicates that Mr. T was a
19 customer.

20 Second, there's a chat log from April 20th, 2005,
21 which the government does not seek to admit, showing
22 that Mr. T solicited commissions from the defendant for
23 finding people to buy modems and a Sigma license on
24 TCNISO.net products -- on that site. There's also
25 evidence that I expect will be admitted, um, when Mr. T

1 asked for the commission.

2 Third, there's a chat log from July 10th, 2005,
3 which the government does not seek to admit, where the
4 defendant told Mr. T that he was sending \$50 through Pay
5 Pal.

6 Fourth, there's a chat log, dated March 31, 2005,
7 and another from April 18th, 2005, which the government
8 does not seek to admit showing that Mr. T was being
9 prosecuted for theft of service.

10 Five, there are additional portions of a chat log
11 from April 20th, 2005, which the government does not
12 seek to admit, where Mr. T asked the defendant if he got
13 feedback and whether Sigma was working for users in
14 Quebec, so he could be sure if it worked for them.

15 And six, um, there's a chat log from April 20th,
16 2005, which the government does not seek to admit, where
17 Mr. T asked the defendant whether people with Sigma can
18 get on-line with the MAC cloning or with a legitimate
19 MAC address and use the highest configuration file? And
20 the defendant replies, "We don't condone theft of
21 service." And Mr. T responds, "But that would be their
22 option, if they had a diabolical mind."

23 So I give those some weight.

24 There's independent nonhearsay corroborating
25 evidence supporting the admission, at least the

1 conditional admission, of certain of Mr. T's
2 statements. That evidence appears to include the
3 defendant's statements in the chat log, which suggests
4 that Mr. T was acting as a broker for TCNISO products.
5 Evidence that TCNISO hardware and software products like
6 modems and Sigma, which Mr. T references in the chat
7 logs and for which he sought commissions were capable of
8 being used as part of the conspiracy to steal service
9 and uncap. This is analogous to **Martinez**, at 324 to
10 328, and **Dynalectric**, 1581 to 1582, which discuss
11 circumstantial evidence based on context on the content
12 of the statement itself.

13 In addition, the government represents that it
14 intends to present testimony from Phillips, Lindquist,
15 and Hanshaw that Mr. T was a friend of the defendant's,
16 was a real reseller of TCNISO equipment, and was a
17 regular participant in the company's website forums
18 where activities relating to the conspiracy, like
19 trading of MAC addresses and configuration files, were
20 routinely characterized.

21 There's similar evidence regarding MooreR being a
22 member of the conspiracy at the time the statements at
23 issue were made. There are statements by MooreR about
24 the naming of CoaxThief. Additional extrinsic proof is
25 required. One form of that extrinsic evidence comes

1 from other statements by MooreR in previous chat logs
2 discussing CoaxThief plus an additional portion of the
3 August 4, 2005 chat log which the government does not
4 seek to introduce as evidence where MooreR talks about
5 offering his MAC-changing software on the defendant's
6 website.

7 There's also independent nonhearsay corroborating
8 evidence which it's been represented will include the
9 defendant's statements in the chat logs referencing
10 MooreR's role in designing CoaxThief and evidence that
11 CoaxThief and MAC-changing software, which the defendant
12 and MooreR are discussing in the chat logs, is capable
13 of being used as part of the conspiracy to steal service
14 and to uncap.

15 In addition, the government represents that it
16 expects to present testimony by Phillips, Lindquist, and
17 Hanshaw that MooreR was a software coder who helped with
18 TCNISO's packet sniffer and MAC-charger software.

19 So I think --

20 MR. BOOKBINDER: Your Honor, it's worth noting
21 that, um, as to the testimony from Phillips, Lindquist,
22 and Hanshaw, I don't know that, um -- you know, they
23 will testify, if we were to ask them, did they know of
24 these names? I'm not sure they're going to be able to
25 provide a lot of testimony about the detail of these

1 people's involvement. So I think it's worth noting
2 that, at this point, that as we talked to them further,
3 that while they're familiar with both Mr. T and MooreR,
4 I doubt that any of them are going to be able to testify
5 in any detail about what their roles were.

6 THE COURT: Is that different than what you
7 gave me in your submission?

8 MR. BOOKBINDER: It is somewhat different,
9 your Honor. It's, um, something that we've asked them
10 as we've talked to them in the last week or so in
11 anticipation of trial and in an effort to try to nail
12 down exactly what they know and what they didn't.

13 And so, um, to the extent that the Court -- now it
14 may be useful, and largely this may not be an issue,
15 because the Mr. T and MooreR chats we would be
16 offering -- we would be seeking to admit initially or at
17 least lay a foundation for it through Craig Phillips
18 because he's the one that preserved it. But we're not
19 intending actually to use them with him and we don't
20 need to necessarily offer them with him. We would be
21 intending to actually show them to the jury and to
22 discuss them with Special Agent Russell who is going to
23 be at the end of the trial.

24 And so while I think we need to ask Craig Phillips
25 a couple of questions about them for foundational

1 purposes, um, it may make sense for us not to offer them
2 at that point at all, the Court would not need to rule
3 on them, and then we could see --

4 THE COURT: So you don't intend to mention
5 them in your opening then? That's part of the reason --

6 MR. BOOKBINDER: Um, let me confer, your
7 Honor, on that.

8 (Pause.)

9 MR. BOOKBINDER: Well, your Honor, at least as
10 to, at least, one of two excerpts, Ms. Sedky will be
11 doing the opening and would like to refer to them. And
12 maybe the answer is that at this point we don't expect
13 the testimony to be terribly helpful on a co-conspirator
14 analysis. We would, um, rely on the statements of
15 Harris and of MooreR and Mr. T in the chats and ask the
16 Court to rule on that basis at this point.

17 THE COURT: I don't understand -- I don't
18 understand what you're saying. If it's not admissible
19 as co-conspirator hearsay, it has to be admissible on
20 some other basis.

21 MR. BOOKBINDER: Oh, absolutely, and we're
22 suggesting that they are co-conspirators and the Court
23 can find that based on Mr. Harris's statements and
24 the --

25 THE COURT: That's what I was getting to. I

1 mean, I did zero in on what I had understood from
2 previous submissions was likely to be the direct
3 testimony, but I actually put that at the end because --
4 well, in the way I just recited this because there's
5 other admissible and inadmissible testimony. It's all
6 being conditionally admitted. In the overall scheme of
7 things, even if it's not finally admitted, I don't know
8 how important these two will be, Mr. T and MooreR.

9 But let's -- let's go back. Let me ask this, I
10 trust, rhetorically.

11 Have you been turning over -- you just said you
12 had further discussions with some of the witnesses and
13 you now know they're not going to be able to say much
14 about MooreR or Mr. T, particularly.

15 MR. BOOKBINDER: Correct.

16 THE COURT: Have you disclosed that previously
17 to the defendant?

18 MR. BOOKBINDER: Yes, specifically the one
19 that we had raised this with most directly is
20 Mr. Phillips and there's a letter that we disclosed
21 to -- we just disclosed or maybe did it earlier in this
22 week --

23 MR. MCGINTY: Well, I, just to be very clear
24 about this, I have it right here in front of me, so.

25 MR. BOOKBINDER: -- to Mr. McGinty, we've

1 asked about each of these people and what he knows,
2 because he was the one we had hoped would have been most
3 helpful, but he's not as helpful as we had hoped. We
4 have been turning them over and we'll continue. Each
5 time we talk to a witness generally we generate at least
6 some kind of a report.

7 THE COURT: Well, maybe I ought to get those,
8 too, because I have the **Jencks**.

9 MR. BOOKBINDER: We can do that, too, your
10 Honor.

11 THE COURT: All right.

12 MR. MCGINTY: Can I address, sort of in-line
13 with this, um, the government was first suggesting that
14 this wouldn't be raised in the opening statement.

15 THE COURT: Would or would not?

16 MR. MCGINTY: That it would not, and it was
17 mentioned that some of it might be, but I wasn't quite
18 sure what --

19 THE COURT: Well, I was going to say --

20 What do you want to use in your opening
21 statement?

22 MR. BOOKBINDER: Well -- if you would hold on
23 a minute, your Honor, I think I can answer that right
24 now.

25 (Pause.)

1 MR. MCGINTY: Your Honor, while we're doing
2 this, there was one thing I wanted to --

3 THE COURT: Just one thing at a time. They
4 have to hear you and you have to listen to this.

5 (Pause.)

6 MR. BOOKBINDER: Your Honor, there are, um,
7 three statements from the MooreR chats that we are at
8 least considering using in the opening.

9 THE COURT: Okay. Go ahead.

10 MR. BOOKBINDER: But they are all statements
11 of Harris, not of MooreR.

12 THE COURT: And these are statements that are
13 mentioned in your motion in limine that we're going
14 through?

15 MR. BOOKBINDER: I don't think they're
16 mentioned in our motion in limine because they're not
17 co-conspirator statements, they are statements of Harris
18 himself.

19 THE COURT: So you're not offering any
20 statement of Mr. T or MooreR that you want to reference
21 in the opening?

22 MR. BOOKBINDER: That's right, your Honor.
23 And we apologize for the confusion. These are
24 statements by Harris to these people in the chats.
25 We've identified them for Mr. McGinty as well. But we

1 didn't put them in the motion because they're not
2 co-conspirator statements. And we've given him a list
3 of the specific ones.

4 THE COURT: All right. So basically you don't
5 want me to rule in limine now on MooreR or Mr. T, you're
6 not going to --

7 Look, there's no way he can listen to you and
8 listen to me. If you need to confer, I'll give you an
9 opportunity. But both of you need to listen to me.

10 Am I correct to understand that none of the
11 statements in the memorandum in support of the
12 government's motion in limine, 94, does the government
13 intend -- that are attributable to MooreR or Mr. T, does
14 the government intend to reference in its opening and
15 you're suggesting that I now wait until -- um, the
16 government's not going to offer any of those statements
17 until it gets to its last two witnesses and at that
18 point I should focus on this again, but I don't need to
19 rule now?

20 MR. BOOKBINDER: I believe that's right, your
21 Honor. And if I could have a minute?

22 THE COURT: Yes.

23 (Pause.)

24 MR. BOOKBINDER: Your Honor, as to -- to the
25 extent the question is are we going to refer to them in

1 the opening? The answer is "No." The Court can either
2 rule now or it can defer on it. We don't expect that
3 the testimony will be particularly helpful in this
4 regard. So if the Court wants to rule based on the --

5 THE COURT: Okay. I'm inclined to
6 conditionally admit these based on what I know even
7 putting aside what I thought was going to be the direct
8 testimony, but -- and these are not to be -- but
9 statements by Mr. T and MooreR are not to be referenced
10 in the opening, unless you come back to me for further
11 guidance, and as the trial goes on -- and my clerks and
12 I are going to keep track of the admissible evidence
13 that would link them to the alleged conspiracy, and I've
14 just cataloged some of the evidence that's either
15 inadmissible or is not going to be offered to the jury,
16 which I can consider, but we'll come back to this before
17 you offer any of the statements. You cannot have any of
18 these statements presented to the jury until you raise
19 the issue again with me, I have further discussion with
20 you, and I rule.

21 MR. BOOKBINDER: That makes sense, your
22 Honor. And we would simply just be asking Mr. Phillips,
23 without offering the exhibit, to just ask him whether he
24 recognizes the chat log and --

25 THE COURT: All right. And at that point I

1 would -- it wouldn't be shown to the jury.

2 MR. BOOKBINDER: Correct.

3 THE COURT: We would give it a letter for
4 identification. It would be marked for identification
5 but not admitted into evidence.

6 And then which witness do you want to offer this
7 through?

8 MR. BOOKBINDER: Special Agent Russell.

9 THE COURT: So before Mr. Russell comes up
10 you'll tell me whether you're going to try to get it in
11 or whether you've decided to forget about it and, if
12 necessary, I'll hear you further and I'll rule. Okay?

13 MR. BOOKBINDER: Yes, your Honor.

14 THE COURT: And is that the same with the
15 posts?

16 MR. BOOKBINDER: If I could, your Honor?

17 (Pause.)

18 MR. BOOKBINDER: Your Honor, we would be
19 seeking to offer the posts and use them only with
20 Special Agent Russell. So it would come at the end of
21 the trial. The posts, again, are another thing that we
22 were planning to, um -- in that case we were going to at
23 least refer to the general topics of the posts in the
24 opening.

25 THE COURT: Meaning what?

1 MR. BOOKBINDER: That there are posts about
2 people uncapping and swapping MAC addresses and things
3 like that. So that probably does implicate the issue of
4 whether these are going to come in.

5 And so, you know, I'm happy to address some of
6 that now, if you'd like, your Honor --

7 THE COURT: Well, my thinking -- before we get
8 to the posts, um, Mr. McGinty, is there anything you --
9 you don't have to say anything, but is there anything
10 you want to say about MooreR or Mr. T?

11 MR. MCGINTY: There was just one ingredient
12 here. I thought the Court to say that there was
13 evidence that Mr. T was a customer because he was on the
14 forum. I don't think the government disputes this, that
15 access to the forum is not limited to customers.

16 THE COURT: Okay. Good. I'm trying to keep
17 up with you, but it's a moving target. That's helpful.
18 Okay.

19 All right. Then, you know, with regard to the
20 posts, as I said, I didn't analyze these -- well, I've
21 analyzed them, but it seems to me that it's going to be
22 more challenging to prove that any particular post is
23 admissible under Rule 801(d)(2)(E). I don't view them
24 as verbal acts. If they're not being offered for the
25 truth, I don't -- there are two problems. I'd have to

1 give a limiting instruction, what are they being offered
2 for? I'd have to have confidence that the instruction
3 would be followed. And I'd have to do a Rule 403
4 balancing.

5 So which particular posts do you want to refer to
6 before we get to Mr. Russell?

7 MR. BOOKBINDER: Your Honor, we wouldn't be
8 talking about any post in particular, but rather the
9 fact that there are posts in which people are all -- but
10 we could talk about what the basis for that is.

11 THE COURT: I mean, I'm going to tell them
12 that the openings are not evidence, but there's two
13 problems. One, if no evidence is admitted, um, the
14 defendant's going to complain there should be a
15 mistrial, you told them about something that there's no
16 evidence to support, and your own credibility is going
17 to be -- well, the credibility of your case is going to
18 be injured because you didn't prove what you said you
19 were going to prove, there were posts, so. This could
20 raise in a motion in limine --

21 Well, you know, show me the two that you think
22 you've got your best chance of persuading me are
23 admissible.

24 MR. BOOKBINDER: Sure. On Page 23, your
25 Honor, the memorandum we've been walking through, the

1 memorandum in support of our motions in limine, those
2 are -- these come from Exhibit 22. We were hoping to be
3 able to offer the entire threads that these come from,
4 but let's start with these two posts because I think
5 they're the clearest examples.

6 THE COURT: So it says: "I have MACs, a lot
7 of MACs, willing to trade," by Sean19661. "I have some
8 MACs to trade. What areas are you in? Insight DD MACs
9 by Aspeer. Insight MACs from Springfield. I'll need
10 some from somewhere else, PM. Me."

11 Um, what's PM?

12 MR. BOOKBINDER: "Private Message," your
13 Honor.

14 THE COURT: All right.

15 Is there any evidence that any of the people who
16 made these posts are customers?

17 MR. BOOKBINDER: These two are, your Honor.

18 THE COURT: So you would say -- okay. So
19 what's -- and is there -- so there'd be statements
20 themselves and you say there's evidence that they bought
21 products?

22 MR. BOOKBINDER: They did, your Honor.

23 THE COURT: Is there evidence of what products
24 they bought?

25 MR. BOOKBINDER: Um, there is, your Honor, but

1 I can't -- if I can just take a look.

2 (Pause.)

3 MR. BOOKBINDER: So for Sean19661, um, his
4 name, if you would like to know, is Sean Davidson,
5 according to the TCNISO records at Go Daddy, and, um, I
6 believe what's described as a "10-pack of a solderless
7 adaptor," which I understand to be a connector that the
8 company sold.

9 THE COURT: You know, but something like
10 CoaxThief sounds like it's -- you know, it's a bad
11 thing, but is that just a device that would have a
12 legitimate and, arguably, illegitimate uses?

13 MR. BOOKBINDER: I don't know, your Honor. If
14 I could actually consult with Mr. Russell very briefly,
15 I could answer that more intelligently.

16 THE COURT: Yeah, is this sugar or morphine?

17 MR. MCGINTY: Sugar.

18 THE COURT: I thought you might say that.

19 (Pause.)

20 MR. BOOKBINDER: Your Honor, Mr. Russell tells
21 me that it's an electronic component. It can be used
22 for -- probably for both legitimate and illegitimate
23 uses.

24 THE COURT: Well, I don't know that I would
25 draw any inference of a conspiracy from buying an

1 innocent product alone. It doesn't add much.

2 That's what Sean bought?

3 MR. BOOKBINDER: Yes. And for the second
4 customer, "Aspeer," is Andrew Spear is the customer's
5 name. He bought two, um, what are listed as "SB-5100
6 Combo," and that's the, um, Surfboard 5100. That is a
7 modem. That's a -- that's the modified modem that
8 TCNISO is selling.

9 THE COURT: It's modified to do what?

10 MR. BOOKBINDER: With their software, to
11 include the Sigma software.

12 THE COURT: And the Sigma software does what?

13 MR. BOOKBINDER: It's the software that allows
14 someone to change their MAC address, obtain a service
15 for a -- a free internet service for --

16 THE COURT: So he bought -- or she bought a
17 suspicious product?

18 MR. BOOKBINDER: Correct, your Honor. And so,
19 I mean, we really have two bases for a fraud rim case
20 and one is the co-conspirator statement that we've been
21 discussing and the other, though, is to the extent that
22 they're making requests, not an assertion of fact, um,
23 we suggest that they fall outside of the hearsay rule
24 altogether and, um --

25 THE COURT: Well, the first one from Sean

1 says, "I have some MACs to trade. What area are you
2 in?" That's not a question. "What area are you in?"
3 is a question, but, I mean, it only has relevance and
4 probative value if, I think, if you take it for the
5 truth, "I have MACs to trade," because you're trying to
6 show that Mr. Harris was part of a conspiracy in which
7 the co-conspirators were interdependent, they had to
8 trade MACs, and this is evidence of both knowledge and
9 intent to trade MACs.

10 MR. BOOKBINDER: Well, it is a -- I mean, this
11 could be evidence that they actually traded MACs.
12 However, what we suggest, and actually what's far more
13 important about this evidence -- and we'll have
14 customers testify that they traded MACs, um, is that --
15 is that on Mr. Harris's own forums, on his website,
16 people are posting offers to trade. Whether they
17 actually meant them, whether they actually executed
18 these trades, is not important for this purpose.

19 THE COURT: What's the evidence going to be
20 that Mr. Harris would know what's -- you know, would
21 have read these posts?

22 MR. BOOKBINDER: There's several things, your
23 Honor. First of all, the, um -- the website. We've got
24 the Go Daddy records showing that he is the owner
25 essentially, the registrar of the website. It's

1 registered to him. He gets the bill. He pays it. It's
2 in his name. Second, we'll have Craig Phillips and
3 Isabella Lindquist, both will testify that they
4 discussed with him, um, things that were posted on the
5 forums and both of them -- that testimony we do expect
6 to get.

7 THE COURT: And what years did they discuss
8 it?

9 MR. BOOKBINDER: Well, let's think about this,
10 your Honor.

11 THE COURT: These are posts in 2007.

12 MR. BOOKBINDER: Um, yes, your Honor.

13 So Mr. Phillips was involved through, um --
14 certainly into 2007, um, from 2003 when the company
15 started or at least shortly thereafter, 2004, at least
16 into 2007, and I don't know the exact dates when he is
17 no longer involved, but what he will testify is that
18 it's a frequent topic of discussion. He will not be
19 able to say that "Mr. Harris and we talked about these
20 posts" or anything about that. Um, Ms. Lindquist stayed
21 involved longer until -- if I could just check, I think
22 it's 2008. Okay. Either '07 or '08. So around the
23 same time, um, she's no longer involved in the company
24 as well.

25 So what they will testify is that it is on an

1 ongoing basis that this was something they talked about
2 and that it was relevant not just as a matter of idle
3 curiosity, but to knowing what people were doing,
4 successfully and unsuccessfully, problems they were
5 having, was relevant to their running the company.

6 THE COURT: So you say, one, that's sufficient
7 to admit this for the truth as co-conspirator hearsay
8 and, two, um, even if not for the truth, of whether Sean
9 actually had some MACs to trade, to show that Mr. Harris
10 knew that his devices were being used in connection with
11 false MAC addresses to steal servers.

12 MR. BOOKBINDER: And just for the fact that
13 people were making posts on his website, seeking to
14 trade MAC addresses, goes to what he believed that
15 people were doing with his products, his knowledge and
16 his intent.

17 THE COURT: All right. Mr. McGinty?

18 MR. MCGINTY: The web post here is December
19 24th, '07. The purchase is, um, June 28, '07, reflected
20 on the records. So there's a five-month hiatus. So
21 there's no continuity between purchase and post.

22 The item that's purchased is a SB-5100 Combo. An
23 SB-5100 Combo would be a modem unmodified, so it doesn't
24 have the software, as well as a BlackCat cable
25 separately provided. So you don't have an integrated

1 modified unit, you have the capability of different
2 things, you don't have a product that is susceptible of
3 immediate application, it depends on how it's going to
4 be done by the person.

5 So some six months later the person is
6 communicating about something, um, during the
7 conspiracy, um, not in connection with the purchase, in
8 furtherance of the conspiracy, but not in connection
9 with the purchase. No linking between this and the
10 purchase which would be integral to making this somehow
11 probative. Interestingly, the government, in its
12 original argument about this, said that these were
13 verbal acts precisely because it didn't want to argue
14 that this was a co-conspirator statement and it also
15 said that they're not being offered for the truth,
16 presumably also recognizing that it wouldn't serve that
17 purpose, but now in an effort to get this in, if not one
18 way, but another way.

19 THE COURT: Well, I've been looking at it as
20 potential co-conspirator hearsay.

21 What do you say to their argument that this isn't
22 offered for the truth, it's to show what information
23 Mr. Harris had which is relevant to showing his intent
24 to conspire in some way?

25 MR. MCGINTY: Obviously it's offered for the

1 truth. Insight MAC's from Springfield. I mean, it's an
2 instant message, so it has the -- you know, some of the,
3 um, words are compacted or compressed. It's perfectly
4 plain, you know, "We have MACs from Springfield. I need
5 some from elsewhere." Um, if we take the truth out of
6 that, um, the government doesn't offer it, and the truth
7 is that they're engaged in selling MACs.

8 THE COURT: Well, that may go to the efficacy
9 of a limiting instruction on the 403 balancing.

10 All right. I understand this better. I'll give
11 you guidance on this on Tuesday. You won't be opening
12 until then. All right?

13 MR. MCGINTY: Can I add one more factor on
14 this?

15 THE COURT: Yes.

16 MR. MCGINTY: Again, on the moderator side of
17 things, the government uses "moderator" as if there's a
18 single moderator who controls all of the discussions.
19 Um, there are different moderators in different
20 compartments of this. Um, additionally, this is not a
21 time when Isabella Lindquist or Craig Phillips is
22 involved in any respect actively or even minimally in
23 the operation of TCNISO.

24 THE COURT: In December of 2007?

25 MR. MCGINTY: In December of 2007.

1 So, um, you know, the suggestion that somehow
2 they're going to come in and make this sort of an
3 integrated co-conspirator admission, I think, is a
4 stretch.

5 THE COURT: Well, I'll think about this one a
6 little further.

7 Is there anything else we ought to discuss today?

8 MR. MCGINTY: Um, there is an important
9 matter, which is that we have several times suggested
10 that the Court ought to make some instructions at the
11 beginning of the case so the jury can get context.

12 THE COURT: I intend to give preliminary
13 instructions and I intend to discuss them with you
14 before I do it. I've given priority, in the limited
15 time I've had to deal with this, because the briefing
16 was only done yesterday, to focus on the evidentiary
17 issues. I intend to work on the weekend on the
18 instructions and if we pick the jury in time, we'll talk
19 about them Tuesday. Well, we'll talk about them at some
20 point on Tuesday and we'll certainly talk about them
21 before I give you some preliminary instructions on
22 Wednesday.

23 How specific they are? Um, and you would like
24 some specific points, and if I'm going to do that, maybe
25 the government would, too. But I don't know. It will

1 depend on my degree of comfort, although I will tell the
2 jury that I expect -- not only are they going to get
3 more detailed instructions at the end of the case, but
4 my own understanding of the law may evolve, so if
5 anything I say at the beginning sounds different than
6 what I say at the end of the case, they have to follow
7 the instructions I give at the end of the case.

8 MR. MCGINTY: You know, the government's
9 opening is going to be, um, as it appears in the grand
10 jury presentation, as it appears elsewhere in the case,
11 um, is an attempt to characterize not only the larger
12 aspect of all of this, but each particular aspect of it
13 as meaningfully bad or illegal. So the grand jury
14 transcripts are sort of replete with things like, Is
15 this legitimate, for example, um, to harvest MAC
16 addresses? Whether there's any reason to get a MAC
17 address? Whether there's any reason to have the
18 capability of doing that? Whether there's any reason to
19 have a change in a config file? All of these, um, in
20 the grand jury, as a sort of a harbinger of what the
21 trial will be like, the government suggests, not in the
22 larger scheme of a wire fraud where it's a cumulative
23 activity, but each of these things is in itself wrong,
24 or to use their word, frequently used through the grand
25 jury, "illegitimate."

1 Now, the jury is going to be sitting through the
2 trial and they're going to be hearing about CoaxThief,
3 they're going to be hearing about other things that are
4 part of the software, without guidance, you know, in a
5 conceptual framework where to understand what is
6 charged, differentiated from what discrete acts are or
7 are not unlawful within that, um, is important because
8 without that they will be adrift and they will be
9 assuming, from the tenor of the government's
10 presentation, that each of those things is in itself
11 wrong and that cumulatively the whole project is wrong.
12 And, you know, unlike a bank robbery case where a jury
13 doesn't have to be told that going into a bank and
14 pointing a gun is probably a very bad thing, um, here
15 what passes for a crime in the area of the sale of
16 software is going to be very important and the
17 orientation is going to be important and doing that at
18 the end is going to cause them to have to go back and
19 revisit things that they didn't have the context to
20 understand when they were first --

21 THE COURT: That's why I do preliminary
22 instructions to help them, you know, get a sense of what
23 the questions will be at the end.

24 MR. MCGINTY: But these issues all -- I mean,
25 where the rubber's going to meet the road, Tuesday,

1 Wednesday, or it's going to be the following week, but
2 at some point, um, the rubber's going to have to meet
3 the road on the **Direct Sales** issue.

4 THE COURT: And I'm going to work on **Direct**
5 **Sales**, but -- you know, part of what I'll tell them, to
6 the extent I get to this level of detail, my preliminary
7 instruction is, you know, I was saying that this and
8 this and this -- you know, he's not charged with -- it's
9 not charged that he committed a crime by selling
10 anything, but it is charged that this was an element of
11 a larger crime, a wire fraud scheme, and that if
12 something might not be illegal alone, it could be part
13 of an unlawful scheme. I would say something like that.

14 MR. MCGINTY: All right. But then what's the
15 "it"? Is the "it" reverse engineering? Is it
16 harvesting MAC addresses? Are MAC addresses entitled to
17 some measure of confidentiality such that if Google
18 grabs them, there's something wrong? All of those are
19 "its."

20 THE COURT: I keep going back to my hammer.
21 Even if it was as innocent as a hammer, it could be, um,
22 an element of the conspiracy, um, or evidence of a
23 conspiracy, or part of an unlawful wire fraud scheme.

24 MR. MCGINTY: But again --

25 THE COURT: But --

1 MR. MCGINTY: The hammer problem is if I say
2 to you, "I will take the hammer you sell me at Home
3 Depot and I will go and I will put it in the skull of
4 somebody in about five minutes," then you don't sell it
5 to them, otherwise you're complicit in what they told
6 you they were going to do. The problem here is that the
7 government is suggesting that knowledge of how something
8 might be used -- actually less than that. The raw
9 capability of a thing to be used in a way suffices to
10 prove, um, a conspiracy with end users whom you didn't
11 know, didn't interact with, didn't communicate with, and
12 that can't be right, it can't be right, because on those
13 instructions, um, the entire software industry, starting
14 with VCRs and moving to the IPOD, all of them in the
15 software industry, and frankly everyone at Home Depot,
16 is at some risk from a proposition run loose and, in a
17 way, um, this isn't just Ryan Harris's case. The issue
18 is how do you contain the proposition of liability on
19 the criminal side in cases where, on the civil side, the
20 law hasn't come close to this?

21 So it's that, I think, that the jury has to
22 understand, um, hammers and whether someone's selling
23 cocaine on the street corner, are perhaps not the prism
24 that the jury ought to see this from, they ought to see
25 it differently.

1 THE COURT: Well, it's helpful for me to hear
2 this. If the government wants to say anything to
3 balance it out, you can, but I'll do more work on it
4 certainly between now and Tuesday.

5 MS. SEDKY: Thank you, your Honor. I will be
6 very brief.

7 To the extent that the Court is inclined to give a
8 preliminary instruction to the jury, we would suggest
9 that the approach that would be the most accurate in the
10 law and the best help to the jury is to simply set out
11 the legal principle that we all agree on, which is that
12 we have to prove that Ryan Harris intended to help his
13 customers steal free and faster Internet service, and
14 we've proposed our Instruction Number 2. If you would
15 want to front-load that earlier on in the jury
16 instructions, we could certainly contemplate that. I
17 mean, I don't think we would object to that. But the
18 format of whatever jury instruction gets given about
19 this supplier context, we believe the best and most
20 accurate and most effective instruction lays out the
21 unrefuted un -- everybody agrees with the legal
22 principle, that we have to show intent, and then there
23 is a list of factors that we are asking the jury to
24 consider in deciding whether, based on those factors,
25 either (a) those factors have been proven, and (b) if

1 they want to choose to infer intent from that? And that
2 is a riskless proposition. We don't have to get into
3 the **Falcone** versus **Direct Sales** meeting of the minds and
4 try to parse out what **Direct Sales** said about what
5 **Falcone** did and which part was -- which part was what.
6 It's clean, it's accurate, and we do not think that it
7 is appropriate to instruct the jury that any one single
8 factor either can or cannot alone suffice. We believe
9 that we should stay silent on that factor.

10 THE COURT: Well, I'll consider it, but with
11 regard to my final instructions and once I understand
12 what alone would not be sufficient, but can be
13 considered, in the totality of the evidence, to show a
14 conspiracy or a scheme, then I may tell the jury that
15 because I think it will help their understanding. But
16 I'm not there yet.

17 MR. MCGINTY: And one more slightly brief
18 thing? Infused in this case is a conflation of the
19 knowledge of a product capability with the government's
20 argument that that is sufficient to establish a separate
21 element, which is the intent to engage in that activity,
22 and their instruction that talks about the product
23 capability is suggesting that that knowledge -- also
24 because there's no other evidence offered that makes
25 that -- that adds a plus factor to the intent, that

1 knowledge suffices to establish intent, and conflating
2 those two is the structural problem in the case.

3 THE COURT: I don't -- from what I understand
4 from the government's case, they're not relying on the
5 mere knowledge, I mean, of some of these chats or some
6 of these, you know, of what's represented to be what the
7 foreseeable testimony is, I think the government's not
8 relying on just what their mere knowledge is, aren't
9 you?

10 MS. SEDKY: Absolutely, your Honor, but with
11 that said, we don't want an instruction that ties the
12 jury's hands if it's not accurate under the law.

13 THE COURT: We'll see what you want at the
14 end. You want to do two things, you want to get a
15 conviction and you want it to be sustained on appeal,
16 and, you know, about two weeks ago you and
17 Mr. Bookbinder, each speaking for the United States,
18 weren't on the same page. But maybe the way the
19 evidence comes in, you'll think it's prudent not to seek
20 the most expansive instruction. But I'll just think
21 about it. I just have more work to do on it.

22 All right. I will see you at 9:00 with Mr. Harris
23 on Tuesday morning. The Court is in recess.

24 (Ends, 12:15 p.m.)
25

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Chief Judge Mark L. Wolf, on Friday, February 17, 2012, to the best of my skill and ability.

/s/ Richard H. Romanow 11-06-12

RICHARD H. ROMANOW Date